



# New Jersey Defense Association

Via Email (Comments.Mailbox@njcourts.gov) and Certified Mail <sup>7/16/17</sup> RTRIR

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Re: Comment on the Mid-Year Report of the Committee on Rules of Evidence

Dear Mr. Blee:

The New Jersey Defense Association ("NJDA"), an organization comprised of New Jersey defense attorneys, insurance claim professionals, self-insurers, and other corporations that devote a substantial portion of their time to the defense of damage suits or to claims administration, submits the following comment on the 2026 Mid-Cycle Report of the Supreme Court Committee on the Rules of Evidence on NJRE 702 ("Report"). This comment, which urges the Supreme Court to adopt the NJDA's proposed amendment to NJRE 702, is issued in response to the invitation to comments on the Committee's report and recommendation.

We thank the Rules of Evidence Committee for its consideration of the NJDA's proposal to amend NJRE 702, which is attached and incorporated into this comment. The NJDA's proposal would align the language of NJRE 702 with Federal Rule of Evidence 702. The midyear report reflects the significant debate and substantial division within the Committee regarding NJDA's proposal. However, NJDA disagrees with the Committee's recommendation and offers the following comments in response.

The Committee's candid acknowledgement that "all members of the bar, including trial and appellate judge and practitioners, would benefit from additional training on how to interpret and apply N.J.R.E. 702" underscores the need for a clear amendment to NJRE 702. Indeed, there should be no room for interpretation with respect to the applicable standard for evaluating the admissibility of expert testimony in New Jersey courts. The standard should be clear to all attorneys and judges so that the law is applied consistently and fairly across all manner of cases and controversies. As noted in NJDA's initial proposal, the potential for unreliable expert testimony to taint the judicial process and lead to unjust outcomes is too important to allow varying "interpretation" of NJRE 702.

The Committee's internal deliberations reflect disagreement and lack of consensus, evidenced by its 16-5 vote, which can be more accurately characterized as a 16-7 vote because two members supported amending NJRE 702 with additional language to make it more stringent than FRE 702. It is self-evident

from the Committee's internal deliberations and the absence of consensus that clarification of NJRE 702 is needed.

Moreover, many of the concerns expressed by the Committee can be ameliorated by comments to the Rule. Specifically, concern over potential confusion regarding the adoption of federal case law applying FRE 702 can be addressed with comments that dispel such a notion. Incidentally, the In re Accutane decision specifically states that New Jersey is not adopting federal case law applying FRE 702. 234 N.J. 340, 383 (2018). Comments can be added to amended NJRE 702 that explicitly state that prior New Jersey case law is not overruled and New Jersey does not adopt federal case law applying FRE 702.

The Committee notes that "several members disagreed with the premise that our trial courts struggled in exercising their gatekeeping authority, viewing the cases cited as outliers that were corrected through appellate review." NJDA disagrees with this assertion, as contemporary examples of the misapplication of NJRE 702 abound, and undoubtedly understate the scope of the problem because most decisions on expert admissibility are not reported or raised on appeal because over 90% of civil cases settle.

A recent example of the misapplication and confusion surrounding NJRE 702 is seen in State v. Lee, No. 3125, 2025 WL 1009307, \*1 (App. Div. Apr. 4, 2025), where the Appellate Division held that the trial court "erred by not conducting an N.J.R.E. 104 hearing and considering the reliability of the fingerprint analysis evidence under Daubert and N.J.R.E. 702." The Appellate Division further concluded that the trial court "did not address the second prong of N.J.R.E. 702—whether [the expert's] opinion was based on a reliably sound methodology—and instead focused on the historical acceptance of fingerprint evidence without considering the studies and reports defendant presented." *Id.* at \*8. The Appellate Division expressed "an overarching concern that the court's analysis failed to sufficiently adhere to the Daubert standard and the principles set forth by our Supreme Court in Olenowski and Accutane." *Id.* The proffered expert testimony in Lee was "admitted without the fundamental principles of [the] methodology being challenged beforehand." *Id.* As such, the Appellate Division "reverse[d] and remand[ed] this matter to the [trial] court to conduct a Daubert hearing and to provide a detailed and complete factor-by-factor Daubert analysis." *Id.* at \*9.

The Lee decision provides further evidence of confusion that could be addressed with a clear, unambiguous Rule that mirrors the recent amendment to FRE 702. Adopting the language of FRE 702 does not mandate that New Jersey adopt all concomitant federal case law – it merely demonstrates that New Jersey adheres to the sound reasoning underlying the amendment to FRE 702 and it desires a similar rule that will clarify and eliminate uncertainty and ambiguity in the standard for admissibility of expert testimony.

As one member of the Rules of Evidence Committee pointed out (Report at 13), there is no difference between In re Accutane's articulation of the Daubert "reliability" factors and FRE 702. The In re Accutane Court was concerned, however, that formally adopting Daubert would mean an embrace of lower court cases purporting to apply Daubert when such courts were doing so with wildly inconsistent results. As support for this concern, Judge LaVecchia in In re Accutane cited the law review described by commentators<sup>1</sup> as "a landmark 2015 article" that served as the "springboard" in the effort to bring about a revision of FRE 702 in the federal courts. The "significant" law review is David E. Bernstein & Eric G. Lasker, Defending Daubert: It's Time to Amend Federal Rule of Evidence 702, 57 Wm. & Mary L. Rev. 1, 26-36 (2015). The Bernstein and Lasker article presented empirical evidence showing that courts were deviating from FRE 702 as originally drafted.

The language changes in revised FRE 702 are modest but were deemed necessary to clear away bad Daubert precedent. Bad lower court decisions were also the concern of the New Jersey Supreme Court in In re Accutane, which it addressed by excluding from its endorsement of Daubert the federal and state court precedent purporting to apply that decision.

The two revisions in text in revised FRE 702 (i) require trial judges to apply the "more likely than not" standard to determine whether an expert opinion reflects (ii) a "reliable" application of reliable principles. Other proof options – the "clear and convincing evidence" standard applicable to certain torts and the "beyond a reasonable doubt" standard applicable to criminal cases – could not apply in a Rule 104 hearing. Further, emphasis on "reliability" lies at the heart of In re Accutane. Thus, there is no basis for any suggestion that these two language changes in FRE 702 conflict in any way with In re Accutane; instead, both text changes serve to reinforce In re Accutane as a leading judicial precedent on the admission of expert testimony.

The intent of the proposed amendment is to further our shared goal of ensuring evenhanded justice for all and fair and impartial decision making throughout New Jersey courts, as is being done by states around the country. NJDA requests the opportunity to appear and further articulate our position at future hearings on this topic, including the Supreme Court's May 19 hearing,

The NJDA appreciates the opportunity to work with the committee and the judiciary as we seek to enhance the quality and reliability of expert testimony

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<sup>1</sup> See Mark A. Behrens & Andrew J. Trask, Federal Rule Of Evidence 702: A History And Guide To The 2023 Amendments Governing Expert Evidence, 12 Tex.A&M L.Rev., 44, 52, 54 (2024) (also calling the article the "impetus" to the 2023 revision).

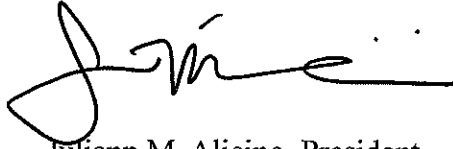
Acting Administrative Director Michael J. Blee

April 17, 2026

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within our judicial system. Thank you for your attention to this matter, and we look forward to further discussion of this important topic.

Respectfully submitted

A handwritten signature in black ink, appearing to read "Juliann M. Alicino". The signature is fluid and cursive, with a large initial "J" and a long horizontal stroke at the end.

Juliann M. Alicino, President  
New Jersey Defense Association